Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

77-18

No. _____

GUY OSCEOLA,

Appellant,

v.

JEROME K. KUYKENDALL, *et al.*,

Appellees,

ON APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

July 5, 1977

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JURISDICTIONAL STATEMENT

Appellant appeals from the order of the United States District Court for the District of Columbia, entered on March 11, 1977, dismissing this action for failure to state a claim upon which relief can be granted. The Appellees in this matter are the Commissioners of the Indian Claims Commission, Jerome K. Kuykendall, Brantley Blue, Margaret H. Pierce, Richard W. Yarborough, and John T.

Vance. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the District of Columbia is not reported. A copy of the opinion is attached hereto as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C. § 1331 against the Commissioners of the Indian Claims Commission, seeking, among other forms of relief, a declaration that the Indian Claims Commission statute, 25 U.S.C. §§ 70-70v is unconstitutional and seeking an injunction against its operation pursuant to 28 U.S.C. § 2282. The order of the three-judge District Court was entered on March 11, 1977, and notice of appeal was filed in that court on May 4, 1977. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253.

QUESTION PRESENTED

May Indian persons presently living on and claiming a legal interest in their ancestral lands challenge, by a suit for declaratory and injunctive relief, a final judgment of the Indian Claims Commission which adjudicates that all Indian rights to the said lands were extinguished by the United States, where the judgment and procedures of the Commission are challenged as violating the United States Constitution and laws and the law of nations?

STATUTES INVOLVED

The relevant sections of the Indian Claims Commission statute, 25 U.S.C. §§ 70-70v (1970 & Supp. V 1975), *as amended by* Act of Oct. 8, 1976, Pub. L. No. 94-465, are set forth in Appendix A hereto.

STATEMENT

Appellant, Guy Osceola, is a member of a substantial group of Seminole people whose ancestors remained in Florida pursuant to the agreement with General Worth in 1842 which ended the Seminole wars. The group of which Osceola is a part is a portion of the Seminole Nation which has never been militarily defeated and which has never ceded nor given up its traditional lands in Florida. These Seminole people, numbering 200 or more, continue to assert and claim the absolute right and title as members of the Seminole Nation to their traditional Seminole lands. Many of these Seminole people live in villages on lands which they hold in common simply and solely as members of the Seminole Nation.

On August 14, 1950, several individual Seminoles claiming to represent the "tribal organization" of the Seminoles filed a petition before the Indian Claims Commission seeking money damages for the alleged taking of all the Seminole lands in Florida without adequate compensation. There was not at that time any federally recognized "tribal organization" of the Seminoles, and the individual petitioners had no authority to file the claim from the group represented by Osceola. In 1953, this claim, known as Docket No. 73, was consolidated with an overlapping claim by certain Seminoles in Oklahoma, known as Docket No. 151.

In order to protect their homes and their rights to their other lands, Osceola's predecessors by motion sought to oppose the proceedings before the Commission, asserting that they did not wish to exchange their land rights for money and that the claimants were acting without authority. That motion was stricken from the record without a hearing and without opinion by Order of the Commission on April 8, 1955. On appeal, the Court of Claims dismissed the appeal on the ground that the Commission's action was not a final order and thus not appealable. *Billie* v. *United States*, 146 F. Supp. 459, 137 Ct. Cl. 161 (1956), *cert. denied*, 355 U.S. 843 (1957).

Again in 1961, the same group moved to oppose the

proceedings before the Commission. The motion was denied without a hearing on the day it was filed. At no time has Osceola or his predecessors ever been accorded an opportunity to be heard in opposition to the claim before the Commission.

On May 8, 1964, the Commission entered an interlocutory order finding that the Seminoles held "Indian title" to all the present State of Florida except for certain lands disposed of before 1823. That order was affirmed by the Court of Claims. *United States v. Seminole Indians*, 180 Ct. Cl. 375 (1967).

At no time did the petitioners before the Commission or the United States assert or litigate the issue whether the remaining Seminoles retained present rights to their lands in Florida. The petitioners based their claim upon the erroneous statement in their petition that all of the Seminole lands had been taken by the United States. The United States never contested this allegation.

On October 22, 1970, the Commission made a final award of $12,262,780.63. On appeal, the Court of Claims remanded the case for more definite findings as to the value of the land. *Seminole Indians v. United States*, 455 F. 2d 539, 197 Ct. Cl. 350 (1972). Finally, a joint motion and stipulation for entry of final judgment in the amount of $16,000,000 were filed on March 17, 1976. The joint motion stipulated that the judgment "shall finally dispose of all rights, claims or demands which plaintiffs asserted or could have asserted with respect to the subject matter of Docket Nos. 73 and 151." On April 27, 1976, the Commission entered its final judgment and award in accordance with the compromise settlement. Action to pay the award is now pending.

On March 26, 1976, Appellant brought this action against the Indian Claims Commissioners in the United States District Court for the District of Columbia. Jurisdiction was invoked under 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201, 2202. Appellant brought this action in his own behalf and in behalf of the class composed of "those Seminole people who by Seminole law and usage are

entitled to live on and utilize Seminole land and other property and who do not wish to surrender such rights in return for monetary damages or compensation and who have not actually authorized nor consented to the presentation of a claim to the Indian Claims Commission." The complaint sought, among other forms of relief, an injunction against the entry of judgment by the Commission and a declaration that the Indian Claims Commission statute, 25 U.S.C. §§ 70-70v, is unconstitutional on its face and as applied to Appellant and his class because, among other reasons, it deprives them of their property without due process of law.

On April 7, 1976, the District Court granted the application for a three-judge court as then required by 28 U.S.C. § 2282, and denied Appellant's application for a temporary restraining order. On March 11, 1977, the three-judge court granted defendants' motion to dismiss this action for failure to state a claim upon which relief can be granted. In its memorandum opinion, the court found that it had subject matter jurisdiction. The court reasoned that the plaintiff and his class have only bare possession at the sufferance of the United States, that their physical possession was not presently being disturbed and that therefore they were not entitled to any relief. No evidentiary hearing was held at any stage of the proceedings.

THE QUESTION IS SUBSTANTIAL

The question presented is whether the Appellant and his class of Seminole people may maintain a suit for injunctive and declaratory relief against a federal agency which has adjudicated that the Seminoles have no further rights to the lands they claim, and in part possess, without complying with minimum standards of due process. The lower court answered this question in the negative on the ground that Appellant and his class have only a bare possession at sufferance and their possession is not now being disturbed.

The court below has erred in three principal respects. As will be more fully discussed below, the court erred in

determining that the decision of the Indian Claims Commission does not affect the rights of the Appellant and his class, for the Commission did in fact adjudicate that all Seminole rights to the lands in question were extinguished. Secondly, the decision below is contrary to this Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), in which final agency action was found ripe for review even in advance of any enforcement or threat of enforcement. Third, the theory of Indian land title relied upon by the lower court utterly denies constitutional and legal protection to Indian persons with respect to their native lands. The theory is without legal or historical foundation and ought to be expressly rejected in light of this Court's decision in *Delaware Tribal Business Committee v. Weeks*, 97 S. Ct. 911 (1977).

The issues raised by this appeal are of national importance because the rulings of the Indian Claims Commission have unlawfully affected the title to and interests in million of acres of land claimed by Indian governments and Indian people. Numerous Indian governments and Indian groups are now attempting to challenge the procedures of the Indian Claims Commission which deny effective participation to interested parties and result in the loss of Indian rights to their lands. A case similar to this, challenging the constitutionality and lawfulness of the Indian Claims Commission's actions, is now pending before the District Court for the District of Columbia. *Six Nations Confederacy v. Andrus, et al.*, No. 77-0515 (D.D.C., filed March 22, 1977). Recently a group of Western Shoshone people claiming present rights to certain lands were denied the right to intervene in an Indian Claims Commission proceeding which purported to adjudicate that these lands had been taken by the United States. *Western Shoshone Legal Defense and Education Association v. United States*, 531 F. 2d 495 (Ct. Cl., 1976), *cert. denied*, 97 S. Ct. 236 (1976). Similar complaints that their lands are being unlawfully disposed of by the Indian Claims Commission are being made publically by the Sioux people in connection with the Black Hills claim (Docket No. 74-B) and by the traditional Hopi elders in connection with a claim prosecuted without their authority or consent (Docket No. 196).

The issues raised by this case are of even greater significance because of their impact on the much publicized land claims by various Indian governments in Maine, Massachusetts, Rhode Island and elsewhere. The theory of Indian land title espoused by the lower court could ultimately determine those claims because, as stated in the opinion below, that theory holds that Congress may extinguish aboriginal Indian land rights without any constitutional limitation.

1. The judgment and award of the Indian Claims Commission does affect the right of the Appellant and his class, because it constitutes an adjucication that their rights to their lands, including their homes and villages, have been extinguished by the United States. In the complaint in this action, Appellant alleged and should have been permitted to prove that he and his class hold a legally protected right and title to their lands as members of the Seminole Nation, not a mere possession at sufferance. The complaint alleged that the Indian Claims Commission was about to deprive the class of its land rights by adjudicating that those rights had been extinguished. The Commission has now done that by entering its final judgment and award. As described in the Statement above, Appellant and his predecessors have never been permitted to be heard or to exclude themselves from the class which the claimants before the Commission purported to represent. The Appellant argued in the court below that the procedures of the Indian Claims Commission are thus in violation of the Constitution because they do not meet the requirements of due process as established by this Court in *Hansberry v. Lee*, 311 U.S. 32 (1940) and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), with respect to class actions where absent parties may be bound by the judgment.

The complaint also alleged that the Indian Claims Commission statute, 25 U.S.C. §§ 70-70v, is unconstitutional on its face and as applied because it denies parties whose rights and property will be affected an opportunity to protect their interests, because the statute delegates unconstitutional authority to the Secretary of the Interior to determine who may appear before the Commission, and

because of other constitutional defects. The complaint also alleged that the Commission had violated the statute in several respects and that the proceedings before the Commission were in violation of the law of nations. The constitutional issues raised by the complaint were found to be sufficiently substantial to warrant convening a three-judge court to hear the case.

The court below did not reach the constitutional issues, but decided the case on a ground not raised or argued below. Contrary to the allegations of the complaint and without any proof, the court stated that the Appellant and his class held no legally protectable right as such but only bare possession.

Regardless of what interest Indian people have in their ancestral lands, it is that interest which the Indian Claims Commission found or assumed to have been extinguished. At this point, it matters not whether that right is a right of absolute title or some lesser right. Whatever the nature of the right, the Commission's judgment and award is for the assumed taking and extinguishment of that interest by the United States.

Appellant and his class alleged in the complaint not merely that they are in fact in possession and that they do in fact utilize the lands, but that they have a legal right to do so protected by the United States Constitution and laws as well as the law of nations. The Commission has taken final action adjudicating that that legal right has been extinguished, without permitting the Appellant and his class an opportunity to defend their right. It is to protect that right that this action was filed.

The final determinations of the Indian Claims Commission by statute have *res judicata* and collateral estoppel effect. Section 70u of the statute provides in part:

> The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

25 U.S.C. § 70u. Furthermore, the terms of the Joint

Motion for entry of final judgment, which were expressly accepted by the Commission in its Final Award of April 27, 1976, included the following:

> Such final judgment shall finally dispose of all rights, claims or demands which plaintiffs asserted or could have asserted with respect to the subject matter of Docket Nos. 73 and 151, consolidated. The entry of final judgment of the Indian Claims Commission pursuant to this motion and the stipulation filed herewith shall constitute a final determination in these cases, from which all parties waive any and all rights to appeal or otherwise seek review thereof.

Thus, the Commission's judgment and award purports to finally dispose of the land rights of Appellant and his class as well as all other Seminoles. *See*, Findings of Fact on Compromise Settlement and Final Award, 38 Ind. Cl. Comm. 62 (Apr. 27, 1976).

One Federal District Court has recently decided that the determinations of the Indian Claims Commission as to extinguishment of Indian title have both collateral estoppel and *res judicata* effect. In *United States v. Dann.*, No. R-74-60 BRT, (D. Nev., Order and Opinion Jan. 4, 1977) (reprinted here as Appendix C) the District Court of Nevada decided that two Western Shoshone Indians who had for years claimed and utilized a portion of their native lands could not contest the determination of the Indian Claims Commission that the Western Shoshone rights to that land had been extinguished. That case arose out of a controversy similar in all relevant respects to this one, where one group of Western Shoshones, over the protest of others, pressed a claim before the Commission for the supposed taking of their lands. In an action by the United States for trespass, the District Court concluded that the defendants, who were part of the group which had attempted to intervene in and oppose the proceedings before the Commission, were barred from asserting rights to the land because the determination of the Commission was deemed to have *res judicata* and collateral estoppel effect as to the question of title, even though the Commission's action was not final.

Therefore, the suggestion of the three-judge court in this case that the Appellant and his class can assert and defend their property rights in some later action is in conflict with *United States v. Dann*, *supra*, and is probably erroneous. If, as the District Court for Nevada concluded, the issue of title will be *res judicata* or subject to collateral estoppel in any future action, then this controversy must be ripe for determination now. After more than 20 years of legal effort, Appellant and his class have never been permitted a single evidentiary hearing, and this appeal is the only possibility for review of the District Court's decision in this case. It is therefore of particular importance that full consideration of this appeal be granted so that the conflicting opinions by the District Courts may be reconciled.

2. The decision of the District Court below is in conflict with the decision of this Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In *Abbott*, this Court enunciated the standards for determining when final agency action is ripe for judicial review. The court below, acting without the benefit of briefs or argument on this issue, did not discuss in its opinion the impact of this Court's decision in *Abbott*.

In *Abbott Laboratories v. Gardner*, *supra*, the Commissioner of Food and Drugs, pursuant to the Federal Food, Drug and Cosmetics Act, issued regulations requiring that labels and advertisements for prescription drugs which bear the proprietary names for the drugs or ingredients also carry the corresponding "established name" every time the proprietary or trade name is used. Petitioners challenged the regulations prior to enforcement or any threat of enforcement on the ground that the Commissioner had exceeded his statutory authority in issuing the regulations. This Court held that the issue was ripe for judicial determination and that pre-enforcement review of the action was appropriate.

Where judicial review is not otherwise precluded by law, the considerations established by the Court for determining ripeness in the context of pre-enforcement review are (1) the fitness of the issue for judicial determination, and (2) the hardship to the parties if

review is withheld. *Id.* at 149. In evaluating fitness for judicial determination, the factors to be considered are (a) whether the issue tendered is a purely legal one, and (b) whether further administrative proceedings are contemplated or whether the agency action is final. *Id.* at 149. In evaluating hardship to the parties, a court must consider whether the impact of the agency action is sufficiently direct and immediate to render judicial review appropriate. *Id.* at 152.

Applying these considerations to this case, it is apparent that the case is ripe for judicial determination. The issues raised by the case are legal and constitutional issues which are peculiarly appropriate for federal court determination. The issues raised are whether the Commission's action and particularly the Commission's procedures are in violation of the Constitution and laws of the United States and the law of nations. In this case, there is no further agency action possible. The Commission's decision is absolutely final and has been duly reported to Congress pursuant to statute. 25 U.S.C. §70t. There is no possible method of review available other than an action such as this. This controversy is no longer a merely abstract dispute, and there is no possible agency action which could lessen the harm created by the Commission's judgment. Thus, this case is entirely fit for judicial determination.

Secondly, there will be great hardship to the Appellant and his class if judicial review is not accorded at this time. A federal agency has made a final adjudication that these Seminole people have no right to the homes and villages where they live or to the lands and waters where they hunt and make their living. Unless review is permitted now, these people, who are uniformly poor and many of whom speak no English, must live with the uncertainty and fear that the United States or some person claiming under the United States will evict them from their homes. As a practical matter, this group of Seminole people will be in a very poor position to defend their legal rights, and according to the decision in *United States v. Dann*, *supra*, (reprinted as Appendix C hereto), they will be barred from litigating the question of title at any later time. The

fact that counsel for the Appellees here has claimed that no action is contemplated to evict the Seminoles is of no legal significance. Thus, the harm and the hardship to Appellant and his class is immediate and direct, and equitable relief is appropriate. *See also, Dunlop v. Bachowski*, 421 U.S. 560 (1975).

3. The theory of Indian land title relied upon by the lower court is without legal or historical foundation, is contrary to the Constitution and ought to be rejected in light of this Court's decision in *Delaware Tribal Business Committee v. Weeks*, 97 S. Ct. 911 (1977). As discussed above, this case is ripe for determination no matter what theory of Indian land title is applied, but the decision below should be reversed as well for the separate and distinct reason that the court below relied upon an erroneous theory of Indian land rights. The opinion below states a theory of Indian land rights which concludes that Indian persons hold no legal interest whatever in their native lands, even when, as here, they are formally recognized by United States treaties, other than bare possession at the will of the United States and a right to compensation when recognized lands are taken. The court below believed that this theory was supported by this Court's opinion in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

The decision of the court below illustrates the confusion and uncertainty that surround the question of Indian land title under United States law and further demonstrates how inappropriate reliance upon this Court's decision in *Tee-Hit-Ton Indians v. United States, supra*, results in a complete denial of constitutional protection for Indian lands. Whatever the merits of the holding in *Tee-Hit-Ton*, which was decided during a period of national policy to "terminate" the Indian tribes (*See*, American Indian Policy Review Commission, Task Force Ten, *Report on Terminated and Non-Federally Recognized Indians*, 1627-1649 (1976)), it does not support the decision below, and to the extent that *Tee-Hit-Ton* denies constitutional protection to Indian lands its reasoning ought to be rejected as unsound.

The *Tee-Hit-Ton* case, which is principally relied on by the court below, was a claim for compensation for the taking by the United States of timber from lands allegedly belonging to the Tee-Hit-Ton clan. The timber had been taken and sold by the Secretary of Agriculture pursuant to a Joint Resolution of Congress (Aug. 8, 1947, 61 Stat. 920). The land from which the timber was taken had been made part of the Tongass National Forest. The petitioners claimed that the taking of timber was compensable, but apparently did not assert that the taking was unlawful, lacking in due process, or otherwise unconstitutional.

The Court found that the Tee-Hit-Tons were not the owners of the lands they had occupied since time immemorial, but rather that they merely occupied the lands by permission of Congress. 348 U.S.C. 272 at 278-279. The Court found that the Tee-Hit-Tons were protected by no treaty with the United States, and that no Act of Congress accorded them legal rights. *Id.* at 278. Without specific reference to the Tee-Hit-Tons and without explaining how or under what circumstances the United States had acquired the title to the Tee-Hit-Tons' land, the Court announced its theory that "discovery and conquest" gave the United States ownership of all Indian land. *Id.* at 279-280. This theory was without foundation as discussed more fully below. Relying upon this theory, the Court concluded that the United States was not obliged by the Constitution to compensate the Tee-Hit-tons for the taking of the timber.

The decision in *Tee-Hit-Ton*, whatever its merit, does not support the conclusion that Indians have no legally protected right to their lands. That case was a claim for compensation for an accomplished taking. Neither the fact of the taking nor the legality of the taking were otherwise contested. The Court was careful to point out that:

> This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force, . . .

Id. at 273. Likewise, the Court noted that this was a congressionally approved taking of timber, expressly

directed by a Joint Resolution of Congress which made specific reference to the Indians' "possessory rights." *Id.* at 276.

In no way does the *Tee-Hit-Ton* decision suggest that Indian rights to land may be taken or impaired through unconstitutional procedures, not does it sanction takings except by express congressional action. *See, United States v. Santa Fe Pacific Ry. Co.*, 314 U.S. 339 (1941). Nothing in *Tee-Hit-Ton* suggests that Congress may, even by express legislation, extinguish or impair Indian rights without adhering to constitutional standards of fairness, reasonableness and procedural due process. These matters were not at issue in *Tee-Hit-Ton*. Thus, the decision in *Tee-Hit-Ton* does not support the conclusion of the District Court below.

It should be added that the *Tee-Hit-Ton* decision dealt with rights not expressly recognized by treaty with the United States. The lands involved in this case, on the contrary, have been held to be acknowledged and protected by the treaties and laws of the United States as belonging to the Seminoles. This was the holding of this court in *Mitchel v. United States*, 34 U.S. 464 (1835) and *Mitchel v. United States*, 40 U.S. 34 (1841).

As stated above, the decision in *Tee-Hit Ton* was legally and historically unsound, and the rule of that case is not good law today. Even if that decision were applicable to this case, the rule of the case ought to be rejected as unsound and regarded as substantially overruled by more recent decisions.

The heart of the decision in *Tee-Hit-Ton* is the theory that the land held and occupied by Indians does not belong to them but rather to the United States. The Court wrote:

> This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained.

348 U.S. at 279. This theory, upon which the rule is based,

is simply incorrect as a matter of law and as a matter of history.

The doctrine of discovery did not operate to convey title to *inhabited* lands. In *Johnson and Graham's Lessee v. McIntosh*, 21 U.S. 240 (1823), and later in *Worcester v. Georgia*, 31 U.S. 350 (1832), Chief Justice Marshall discussed the discovery doctrine as it related to Indian lands and concluded that discovery of an inhabited land did not convey title and could not affect the title of those already in possession. Discovery gave rights only as against other European nations. *See, Johnson and Graham's Lessee v. McIntosh, supra* at 253. Marshall wrote in *Worcester v. Georgia:*

> It was an exclusive principle which shut out the right of competition among those who had agreed to it, . . . but could not affect the rights of those already in possession, either as aboriginal occupants,or as occupants by virtue of a discovery made before the memory of man.

31 U.S. at 369. Thus, the United States could not have acquired any title good as against the Indian inhabitants by virtue of discovery. *See also,* I *Oppenheim's International Law* 554-559 (Lauterpacht, *ed.*,1955).

Furthermore, as a matter of history and a matter of law, the United States has never asserted title to Indian lands by right of conquest. John Marshall explicitly rejected this theory of title in his opinion in *McIntosh, supra*, though *McIntosh* is sometimes mistakenly cited for the opposite proposition. *See, Johnson and Graham's Lessee v. McIntosh, supra* at 260-261. The United States has always flatly denied taking Indian lands by right of conquest. *See, Annual Report of the Commissioner of Indian Affairs for 1890,* xxix (1890). *See also,* C. Thomas, *Indian Land Cessions in the United States, Introduction,* 18th Annual Report of the Bureau of American Ethnology, Part II, p. 640 (1897); W. Washburn, *Red Man's Land—White Man's Law,* 56-57 (1971).

In addition it must be emphasized that the decision in *Johnson and Graham's Lessee v. McIntosh*, relied upon by

the Court in *Tee-Hit-Ton*, was that title derived from a grant by an Indian government was not good as against a grant of the same lands by the United States after the lands had been ceded to the United States by the Indian government. Thus, *McIntosh* provides scant support for the Court's statements in *Tee-Hit-Ton*, though the rambling discussion of Indian title in *McIntosh* is often mistakenly cited for the proposition announced by the Court in *Tee-Hit-Ton*.

Not only was the *Tee-Hit-Ton* decision unsupportable in its own day, but it has since been substantially undermined and, in effect, overruled by more recent decisions of this Court concerning Congress' powers in Indian affairs and the protections of the Fifth Amendment. For example, in *Delaware Tribal Business Committee v. Weeks*, 97 S. Ct. 911 (1977), this Court decided that Congress' power over Indian affairs is subject to constitutional limitation. In *Weeks*, this Court wrote:

> The statement in *Lone Wolf*, at 565, that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the Court of congressional power to abrogate treaties, see generally *Antoine v. Washington*, 420 U.S. 194, 201-204 (1975), has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. See *e.g.*, *Morton v. Mancari*, 417 U.S. 535 (1974). "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality opinion); see also *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935); cf. *United States v. Jim*, 409 U.S. 80, 82 n. 3.

Id. at 918-919. This decision makes clear that Congress' power to affect Indian rights is not without constitutional limitation, and is subject to judicial scrutiny. Accordingly, any suggestion based upon the *Tee-Hit-Ton* decision that Indian rights to their lands may be affected or impaired without regard to constitutional limitation must be rejected.

Furthermore, since 1955, the Supreme Court has repeatedly held that the Fifth Amendment protections of procedural due process must be accorded where significant rights are at stake. *Dillard v. Industrial Commission of Virginia*, 416 U.S. 783 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

It is submitted that the issues raised by the complaint in this action are ripe for judicial determination and that the District Court erred in dismissing the action. The question and the issues raised by this appeal are substantial and they are of considerable public importance.

Respectfully submitted,

ROBERT T. COULTER
Counsel for Appellant

The assistance of Mr. Curtis Berkey of the Institute for the Development of Indian Law and J. Youngblood Henderson, Esq., University of California School of Law, Berkeley, California, is gratefully acknowledged.

APPENDICES

APPENDIX A

The relevant portions of the statute are as follows: 25 U.S.C. §§ 70, 70a, 70g, 70h, 70i, 70k, 70l, 70n, 70p, 70r, 70s, 70t, 70u, 70v.

§ 70. Creation of Commission

There is created and established an Indian Claims Commission, referred to in this chapter as the Commission.

§ 70a. Jurisdiction; claims considered; offsets and counterclaims

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 250 of Title 28: *Provided*, That expenditures for food, rations, or provisions shall not be deemed payments on the claim. The Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478 and 479 of this title, save expenditures made under section 465 of this title, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

§ 70g. Record of proceedings; public inspection

A full written record shall be kept of all hearings and proceedings of the Commission and shall be open to public inspection.

§ 70h. Control of procedure

The Commission shall have power to establish its own rules of procedure.

§ 70i. Presentation of claims

Any claim within the provisions of this chapter may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

§ 70k. Limitation of time for presenting claims

The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

§ 70l. Notice to tribes; investigation of claims; availability of data

(a) As soon as practicable the Commission shall send a written explanation of the provisions of this chapter to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the United States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims be sent to the Commission, together with the names of aged or invalid Indians from whom depositions should be taken immediately and a summary of their proposed testimonies.

(b) The Commission shall establish an Investigation Division to investigate all claims referred to it by the Commission for the purpose of discovering the facts relating thereto. The Division shall make a complete and thorough search for all evidence affecting each claim, utilizing all documents and records in the possession of the Court of Claims and the several Government departments, and shall submit such evidence to the Commission. The Division shall make available to the Indians con-

cerned and to any interested Federal agency any data in its possession relating to the rights and claims of any Indian.

§ 70n. Attorneys of claimants; selection, practice and fees; Attorney General to represent United States; compromise of claims

Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case. The attorney or attorneys for any such tribe, band, or group as shall have been organized pursuant to section 476 of this title, shall be selected pursuant to the constitution and bylaws of such tribe, band, or group. The employment of attorneys for all other claimants shall be subject to the provisions of sections 81, 82, 83, and 84 of this title.

The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as a part of its report as provided in section 70t of this title in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 70u of this title.

§ 70p. Hearings

The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim. Hearings may be held in any part of the United States or in the Territory of Alaska.

§ 70r. Final determinations of Commission

The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions.

§ 70s. Review by Court of Claims and Supreme Court

(a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. In similar manner and with like effect either party may appeal to the Court of Claims from any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final as to the

amount of recovery; and any such interlocutory appeal shall be taken on or before January 1, 1961, or three months from such interlocutory determinations, whichever is later: *Provided*, That the failure of either party to appeal from any such interlocutory determination shall not constitute a waiver of its right to challenge such interlocutory determination in any appeal from any final determination subsequently made in the case. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of the section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28.

§ 70t. Report of determination of claim to Congress

In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.

The report to Congress shall contain (1) the final determination of the Commission; (2) a transcript of the proceedings or judgment upon review, if any, with the instructions of the Court of Claims; and (3) a statement of how each Commissioner voted upon the final determination of the claim.

§ 70u. Payment of claim after final determination; adverse determination as bar to further claims

(a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this chapter shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

§ 70v. Dissolution of Commission and disposition of pending claims

The existence of the Commission shall terminate at the end of fiscal year 1978 on September 30, 1978, or at such earlier time as the Commission shall have made its final report to the Congress on all claims filed with it. Upon its dissolution, the records and files of the Commission in all cases in which a final determination has been entered shall be delivered to the Archivist of the United States. No later than December 31, 1976, the Indian Claims Commission may certify and transfer to the Court of Claims all cases which the Commission determines it cannot completely adjudicate by September 30, 1978. In addition, the Commission may, at any time prior to September 30, 1978, certify and transfer to the Court of Claims any case which it determines cannot be completely adjudicated prior to the dissolution of the Commission. Jurisdiction is hereby conferred upon the Court of Claims to adjudicate all such cases under the provisions of section 70a of this title. *Provided*, That section 70a of this title shall not apply to any cases filed originally in the Court of Claims under section 1505 of Title 28. Upon dissolution of the Commission, all pending cases including those on appeal shall be transferred to the Court of Claims for adjudication on the same basis as those authorized to be transferred by this section.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUY OSCEOLA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 76-492
JEROME K. KUYKENDALL, et al.,	)	
	)	
Defendants,	)	
	)	

MEMORANDUM OPINION

In this action for declaratory and injunctive relief, plaintiff alleges that the Act creating the Indian Claims Commission, 25 U.S.C. §§ 70-70v, is unconstitutional on its face and as applied to plaintiff. The matter first came before the court on plaintiff's motion for a temporary restraining order, which was denied in an order of April 7, 1976.[1] Subsequently, a three-judge court was convened to hear the merits of plaintiff's claim, pursuant to 28 U.S.C. §2284. Now before this three-judge court is defendants' motion to dismiss. Also currently pending is plaintiff's motion for certification of a class pursuant to Rule 23 of the Federal Rules of Civil Procedure and Rule 1-13(b) of the local rules of court.

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[1]The court's order denying the temporary restraining order was based on the failure of plaintiff to show that he and his class were in imminent danger of irreparable injury, as is required by *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958).

Plaintiff Guy Osceola is an Indian residing in the state of Florida on an unspecified tract of land which he terms part of the "territory of the Seminole Nation." He purports to represent a separate and distinct group of Seminoles known as the Everglades Miccosukee Tribe of Seminole Indians. The complaint alleges that plaintiff "is a direct descendant of those Seminole people, members of the Seminole Nation, who have never been militarily defeated, have never signed a written treaty of peace, and have never ceded nor given over their right to freely live upon and utilize their aboriginal terrritory in what is now known as Florida." The Seminoles whom plaintiff seeks to represent number from one to two hundred persons, many of them living in remote reaches of the Everglades and not speaking English.

Underlying plaintiff's claim is a rather complicated procedural history which begins in 1950, when the Indian Claims Commission received a petition on behalf of the "Seminole Indians of the State of Florida." The petition sought compensation for unfair dealing in the two treaties which resulted in the Indians' relinquishment of Florida and their eventual relocation on an Oklahoma reservation: (1) the 1823 Camp Moultrie Treaty under which the Indians relinquished "all claim or title which they may have to the whole territory of Florida" in return for the promise of a Florida reservation and further consideration totaling $152,500; and (2) the 1832 Treaty of Payne's Landing which relocated the Seminoles from the Florida reservation to the Indian Country in Oklahoma. In 1953 the petition, Docket No. 73 before the Indian Claims Commission, was consolidated with a petition for an overlapping claim by the Seminoles of Oklahoma, Docket No. 151.

The persons filing the 1950 petition claimed to be acting for the Seminole tribal organization, though at that time there was no such tribal organization recognized by the Secretary of the Interior. Plaintiff in the instant case alleges that those persons acted without authority from the class of Indians which plaintiff seeks to represent. Plaintiff differentiates his claim from that of the Seminoles who filed the 1950 petition by noting that they have requested only money relief, which is apparently the only sort of relief the Indian Claims Commission is empowered to grant. In contrast, plaintiff speaks for a group of

Indians now possessing "Seminole land" and desiring to remain in possession of that land.

Fearful that the proceedings before the Indian Claims Commission would somehow affect their interest in the land which they occupy, plaintiff and his predecessors in interest have embarked on an extended, if sporadic, campaign to keep the petitioners in Docket No. 73 from obtaining a judgment from the Commission. In 1954 a group calling itself the General Council of the Miccosukee Seminole Nation filed a "motion to quash" the 1950 petition. That motion was struck from the record in an order of April 8, 1955, by the Indian Claims Commission. On appeal from that action by the Commission, the Court of Claims dismissed the appeal on the ground that the order denying the motion was not a final order and therefore was not appealable. *Billie* v. *United States*, 146 F. Supp. 459, 137 Ct. Cl. 161 (1956), *cert. denied*, 355 U.S. 843 (1957). In dictum the Court of Claims made comments which appear relevant to the instant suit;

> It seems to be appellant's position that although it is not and does not wish to be a party to the suit, its title to part of the land which is the subject matter of the suit is paramount, and that a decree of the Indian Claims commission establishing the rights of the original parties to that subject matter (land) would work an injustice and irreparable injury on the appellant. If appellant's title to the land which is the subject matter of the suit is indeed paramount, his paramount title will not be affected by the decree of the Commission as to the rights of the original parties since it will not purport to adjudicate appellant's title or right to the land in question.

146 F. Supp. at 461. The same group that filed the motion to quash in 1954 also filed a motion to dismiss the pending petition in 1961; that motion was denied by the Indian Claims Commission on the day it was filed. Plaintiff associates himself and the group he seeks to represent with the group which filed the 1954 and 1961 motions.

On May 8, 1964, the Commission entered an interlocutory order finding that petitioners in Docket Nos. 73 and 151 had established "Indian title" to all of the present state of Florida with the exception of certain limited areas which had been disposed of by the Seminoles prior to 1823. That ruling was affirmed by the Court of Claims in *United States* v. *The Seminole Indians*, 180 Ct. Cl. 375

(1967). The Commission made a final award of $12, 262,780.63 on October 22, 1970. The United States appealed the award to the Court of Claims, and the Court of Claims remanded the case to the Commission for more specific findings and reasonings as to the value of the land involved. *Seminole Indians* v. *United States*, 455 F. 2d 539, 197 Ct. Cl. 350 (1972).

After negotiations and approval by all the parties, a joint motion for entry of a final judgment in the amount of $16, 000,000 was filed with the Commission on March 17, 1976. The Commission held a hearing on that motion March 26, 1976. Plaintiff contends that he and the members of his proposed class received no formal notice of the hearing and had no opportunity to be heard and that the hearing was held in violation of the Commission's own rules regarding the scheduling of such hearings. Thus the hearing is said to violate plaintiff's rights to due process of law. Plaintiff further alleges that his due process rights were infringed by inadequate notice concerning a meeting which was held January 22, 1976, at Hollywood, Florida, for the purpose of discussing the proposed settlement.[2]

As the petitoners' claim slowly made its way toward final judgment, yet another group of Seminoles appeared before the Commission seeking to be heard. In 1968 a group called the Miccosukee Tribe, federally recognized since 1962, filed a motion to intervene in the proceedings before the Commission. The motion was denied on the ground that the proposed intervenor was already adequately represented by the original petitioners; no appeal was taken from that denial. Plaintiff and his group are not members of the federally recognized Miccosukee organization, and they disavow that organization's attempt to share in any monetary settlement of the claims before the Commission. Similarly, the federally recognized Miccosukees disclaim any association with plaintiff and his predecessors in interest who have sought to halt the Commission's consideration of the Seminole land

[2]In its findings of fact concerning the compromise settlement of $16,000,000, issued April 27, 1976, the Indian Claims Commission found that the notice for the January 22, 1976, meeting had been adequate.

claim. In its 1968 motion to intervene in the Commission proceedings, the federally recognized Miccosukee Tribe referred to the 1954 motion to quash as "ill-advised" and to the 1961 motion to dismiss as filed "by a lawyer unauthorized to act on [the Miccosukees'] behalf."

Plaintiff's primary concern in this suit for declaratory and injunctive relief is that his property rights and those of the Indians he represents will be undermined by the adjudication before the Indian Claims Commission—an adjudication in which they have been denied effective participation. In an attempt to bar the entry of a final judgment by the Commission, plaintiff argues that the entire statutory scheme of the Indian Claims Commission Act, 25 U.S.C. §§70-70v, operates to deprive him and his proposed class of the due process of law guaranteed by the fifth amendment. The alleged constitutional violation springs from the Commission's adjudication of plaintiff's property rights without notice and opportunity to be heard and without opportunity to exclude himself from the effects of a judgment. More specifically, plaintiff contends that §70i of the Act is unconstitutional because it delegates to the Secretary of the Interior the authority to determine without appropriate standards, who may proceed as a tribal representative before the Indian Claims Commission. Plaintiff also alleges, as a secondary matter, that the Act deprives him and his proposed class of the equal protection of the law since it requires Indians to assume heavier burdens than other racial or ethnic groups in the assertion and protection of their property rights.

Stripped to its bare essentials, plaintiff's claim is that he and his group hold "Indian title" to the land on which they reside by virtue of their aboriginal possession of it—a possession which continues to this day. Plaintiff contends that this Indian title was not disturbed by the treaties of 1823 and 1832 because his ancestors were not allowed meaningful participation in those agreements and that, in fact, his ancestors' rights in the land were recognized by the United States in an oral treaty of 1842. Defendants' motion to dismiss is based primarily on the arguments that the property rights claimed by plaintiff are not protected by the fifth amendment because Congress has never recognized any Indian rights in the disputed land and that, in any event, any rights which plaintiff may have in

the subject territory will be unaffected by the award of the Indian Claims Commission which is sought to be enjoined by this suit.[3]

Resolution of this conflict requires examination by the court of the concept of original Indian title,[4] a legal doctrine dating from the opinion of Chief Justice Marshall in *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). In that case the Supreme Court indicated that the sovereign held exclusive title to all aboriginal Indian lands, subject to a right of occupancy in the Indians still residing there. Thus the Indian title claimed by plaintiff cannot be a fee simple absolute as the use of the term "title" might imply; rather, if plaintiff in fact holds Indian title to the subject territory because of continued possession since aboriginal times, that Indian title conveys no more than a right to use and occupy the land at the will of the United States.

The relatively narrow view of Indian property rights embodied in *Johnson* v. *M'Intosh* was reaffirmed in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), the most recent case in which the Court has fully considered the question of Indian title. The Tee-Hit-Tons, an Alaskan Indian tribe, argued that their rights under the fifth amendment were violated by the refusal of the United States to compensate them for a taking of timber from land allegedly owned by the tribe. Like plaintiff in this case, they contended that their "tribal predecessors have continually claimed, occupied and used the land from

[3]In their motion to dismiss, defendants have argued that this court lacks jurisdiction over plaintiff's claim and that plaintiff should take his case to the Court of Claims. Such an argument ignores the fact that plantiff seeks an injunction and a declaratory judgment, relief which the Court of Claims is not empowered to grant. *See United States* v. *King*, 395 U.S. 1 (1969). Plaintiff's claim is clearly one "arising under" the Constitution and laws of the United States, and this court thus has jurisdiction over it pursuant to 28 U.S.C. §1331.

[4]The law of Indian title prior to the decision of the Supreme Court in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), is examined in Cohen, "Original Indian Title," 32 Minn. L. Rev. 28 (1947). *See also* "The Supreme Court, 1954 Term," 69 Harv. L. Rev. 119, 147-51 (1955); Note, "Systemic Discrimination in the Indian Claims Commission: The Burden of Proof in Redressing Historical Wrongs," 57 Iowa L. Rev. 1300, 1304-06 (1972); Comment, 26 Rutgers L. Rev. 909, 913-16 (1973).

time immemorial." *Id.* at 277. The government urged that the Indians had no compensable interest in the land because Congress had not recognized any property right in the Indians. The Supreme Court accepted the government's argument, holding that congressional recognition of Indian property rights "may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Id.* at 278-79.

With respect to the Tee-Hit Tons' claim of aboriginal title arising from the tribe's longstanding occupation of the territory in question, the Court said:

> It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty", as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Id. at 279.

After a review of the prior cases which were considered relevant to the facts presented in *Tee-Hit-Ton*, the Court added:

> No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.

Id. at 281-82. The court concluded that the taking by the government was not compensable "because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the

United States protected by the Fifth Amendment or any other principle of law." *Id.* at 285.

Clearly emerging from the holding of the Court in *Tee-Hit-Ton* are several principles which have a direct bearing upon this case: (1) fee title to the Indians' aboriginal land is vested in the United States even if an Indian tribe can claim that it originally held Indian title to the land; (2) any right which Indians of today have in such former Indian territory is a mere right of possession or occupancy, subject at any time to taking or extinction by Congress; and (3) recovery for past wrongs to the Indians who were deprived of their lands is a matter of legislative grace rather than legal liability on the part of the United States. Harsh as these rules may seem, they remain the law applicable to plaintiff's claim. In a much more recent decision than *Tee-Hit-Ton*, the Court noted in dictum the salient aspects of the law of Indian title:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. . . Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.

Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661, 667 (1974).

Assuming *arguendo* that plaintiff could demonstrate that he and his group hold Indian title to the land in question, the most which that Indian title could give him, under numerous decisions of the Supreme Court,[5] is a right to possession and occupancy. Regardless of the judgment entered in Docket Nos. 73 and 151 by the Indian Claims Commission, plaintiff's right to possess the land may be terminated at any time by the United States. The decision by the Commission represents its finding that the Seminoles held Indian title to most of the state of Florida

[5]See cases discussed in Cohen, "Original Indian Title," 32 Minn. L. Rev. 28 (1947).

prior to the 1823 treaty and that the compensation which they received for ceding that land to the United States was inadequate. The judgment in Docket Nos. 73 and 151 is a means of providing additional compensation to the Seminoles' descendants—compensation granted by Congress as an act of legislative grace. Entry of the judgment will create no new property rights in the United States, for the United States already holds fee simple title to the land, subject only to any rights of possession which plaintiff and others like him may have.[6] Similarly, plaintiff's right of possession and occupancy will not be affected by the judgment.

Since plaintiff's claim of Indian title gives him nothing more than a mere right of possession of the land, it is difficult to see how plaintiff could assert a cause of action against the Indian Claims Commission or any other agent of the United States until that possession is disturbed. Plaintiff's complaint clearly indicates that he and his group remain in possession of the land to which they claim Indian title. Furthermore, counsel for defendants represented to the court during oral argument that the United States contemplated no action of any sort against plaintiff or his class.[7] Under such circumstances, the court must conclude that plaintiff's complaint is premature. Plaintiff's possessory rights, which are the only rights available to him under a claim of Indian title, are not presently threatened, and they may never be. As one commentator has observed "[j]udicial machinery should

[6]The *Tee-Hit-Ton* Court held that ownership vested in the United States by virtue of its conquest of the Indians:

> This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained.

348 U.S. at 279. Defendants in this case argue that the United States holds title based on the Seminoles' cession of the territory under the treaties of 1923 and 1932. Under either theory, it is clear that fee simple title to the land in question is now in the United States.

[7]This representation was made during oral argument on plaintiff's motion for a temporary restraining order in April 1976. Ostensibly nothing has happended since that time to change the government's position.

be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." K. Davis, *Adminstrative Law Text* 396 (3d ed. 1972). *See International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222 (1954).

If in the future plaintiff's possesory interest is challenged, his claim of Indian title may become ripe for judicial consideration. At that time he may be able to establish that he and the group he represents hold Indian title to their land by showing "actual, exclusive, and continuous use and occupancy 'for a long time' " prior to the challenge. *Sac & Fox Tribe* v. *United States*,315 F. 2d 896, 903, 161 Ct. Cl. 189, 201-02, *cert. denied*, 375 U.S. 921 (1963). If Indian title is proven, then the right of occupancy can be extinguished only by "plain and unambiguous" act of Congress. *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 346-47 (1941). When the right of occupancy is so extinguished, no compensation is available to the Indians unless their Indian title has been "recognized."[8] *Tee-Hit-Ton Indians* v. *United States, supra*, 348 U.S. at 281-85. And such recognition, like extinguishment of Indian title, must be by unequivocal act of Congress:

> Congress, acting through a treaty or statute, must be the source of such recognition, and it must grant legal rights of permanent occupancy within a sufficiently defined territory. Mere executive "recognition" is insufficient, as is a simple acknowledgment that Indians physically lived in a certain region. There must be an intention to accord or recognize a *legal* interest in the land.

Sac & Fox Tribe v. *United States, supra*, 315 F. 2d at 897.

[8]Plaintiff relies upon *Mitchel* v. *United States*, 9 Pet. 711 (1835), for the proposition that the Seminoles held recognized, treaty-guaranteed title to their Florida land. Defendants content that *Mitchel* is inapposite to the instant case because it dealt with the narrow issue of title to a specific tract of land. The court need not consider at this time the impact of the *Mitchel* holding upon plantiff's rights since any claim which plaintiff might have is not yet ripe. In light of *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), and other cases subsequent to *Mitchel*, it appears that the question of whethr plaintiff's right of occupancy is recognized by treaty would arise only upon extinguishment of that right by the United States and then only in order to determine whether plaintiff was entitled to compensation.

Eventually plaintiff may be required to prove certain of the allegations of his complaint in order to protect his rights against interference by the United States or third parties.[9] For the present, however, the most he claims is recognized Indian title and the most to which he would be entitled under that claim is a right of possession and perhaps of compensation should that possession be disturbed in the future.[10] It is undisputed that plaintiff is currently in possession of the land and that the United States has no impending plans to contest that possession. Thus plaintiff's complaint sets forth no concrete or current controversy and must be dismissed for failure to state a claim upon which relief can be granted.

[9]If plaintiff's claim of recognized Indian title should become ripe at some future time, the appropriate forum in which to assert that claim would be the Court of Claims rather than federal district court. The Court of Claims has jurisdiction over such actions by the terms of 28 U.S.C. §1505, which provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

[10]Plaintiff attempts to avoid the holding of the *Tee-Hit-Ton* case by noting that there the Indians' rights were extinguished by Congress, as it clearly has the power to do, whereas here it is the members of the Indian Claims Commission who threaten an "unconstitutional taking or interference" with Indian land. Plaintiff's Memorandum in Opposition to Motion to Dismiss at 12. The court, however, does not believe that there has been an interference with any right possessed by plaintiff. In any event, the comments of the *Tee-Hit-Ton* Court concerning the nature of Indian title remain unaffected by the distinction which plaintiff seeks to draw between his case and that of the Tee-Hit-Tons.

In the alternative, plaintiff suggests that the court consider the *Tee-Hit-Ton* decision to have been overruled by subsequent cases such as *Goldberg* v. *Kelly*, 397 U.S. 337 (1969), which establish rights of procedural due process under the fifth amendment. Those cases are not relevant to the issues raised in *Tee-Hit-Ton*, and the continuing validity of the *Tee-Hit-Ton* view of Indian title is clearly suggested by the Court's remarks in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667 (1974).

An appropriate order accompanies this memorandum opinion.

/s/ Malcolm R. Wilkey
UNITED STATES CIRCUIT JUDGE

/s/ Joseph A. Waddy
UNITED STATES DISTRICT JUDGE

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Civil No.
R-74-60
BRT

MARY DANN and
CARRIE DANN,
Defendants.

ORDER

This is an action filed by the United States seeking damages and injunctive relief against Mary Dann and Carrie Dann for trespass on certain lands located within the Elko Grazing District in the District of Nevada. Defendants deny such trespass and affirmatively assert their beneficial ownership of the same land. The plaintiff (United States) and defendants (Mary Dann and Carrie Dann) have filed a motion and crossmotion, respectively, for summary judgment pursuant to Rule 56, F.R.C.P. The facts are not in dispute.

On June 28, 1934, Congress enacted the Taylor Grazing Act, 43 U.S.C. 315 et seq., authorizing the Secretary of the Interior ". . . to establish grazing districts of vacant, unappropriated and unreserved lands from any part of the public domain of the United States . . . , which are not in national forests, national parks and monuments, Indian reservations . . . , and which in his opinion are chiefly valuable for grazing and raising forage crops." Pursuant to this authority, the Department of the Interior established the Elko Grazing District in Nevada on April 8, 1935.

Section 3 of the Taylor Grazing Act authorizes the Secretary to issue permits to certain designated persons for the privilege of grazing livestock on the public lands.

In complying with these provisions, a license to graze livestock on certain lands located within the Elko Grazing District was issued to Ted Fromm, not a party to this action.

The defendants, Mary Dann and Carrie Dann, are Western Shoshone Indians and have permitted their livestock to roam on the same land or portions thereof as Fromm, but without obtaining the necessary permit pursuant to the Taylor Grazing Act. When a formal request issued to the defendants by the Bureau of Land Management to cease the unauthorized grazing proved unavailing, the United States brought this action on behalf of Fromm for damages resulting from loss of forage and to enjoin the defendants from further trespass.

In the defendants' affirmative defense they have alleged that the land are beneficially owned by themselves and others as members of the Western Bands of Shoshone Indians pursuant to the Treaty of Ruby Valley and that the provisions of the Taylor Grazing Act are inapplicable to lands held by Indian title based on aboringinal possession.

The number of issues pending before this court has been reduced pursuant to the Pre-Trial Order dated February 6, 1975. Those issues remaining and to be considered at this time are as follows.

(a) Whether the Taylor Grazing Act, 43 U.S.C. § 315, is applicable to lands which were aboriginally used and occupied by the Western Shoshone at the time the land was ceded to the United States by Mexico under the Treaty of Guadalupe-Hidalgo, 9 Stat. 922.

(b) Whether the Treaty of Guadalupe-Hidalgo, 9 Stat. 922, prohibits or allows application of the Taylor Grazing Act, 43 U.S.C. § 315, to lands aboriginally used and occupied by the Western Shoshone at the time of that treaty's ratification.

(c) Whether the Taylor Grazing Act, 43 U.S.C. § 315, is applicable to lands within the boundaries described in Article V of the Treaty of Ruby Valley, 18 Stat. 689.

(d) Whether the decisions of the Indian Claims Commission in *Shoshone Tribe of Indians of the Wind River Reservation v. United States*, 11 Ind. Cl. Comm. 387 (1962), and *Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5 (1972), and the decision of the

United States Court of Claims in *Western Shoshone Legal Defense and Ed. Assn'n v. United States*, 531 F.2d 495 (Ct. Cl.) *cert. denied*, 96 S. Ct. ____, 45 Law Week 3280 (1976), are *res judicata* of legal issues (a) through (c).

(e) Whether or not the plaintiff has a general fiduciary obligation to the Western Shoshone to hold their lands in trust, to protect their property rights, and to administer the lands for their benefit.

We will consider whether the findings and conclusions of law arrived at by the Indian Claims Commission and the United States Court of Claims are to be afforded a *res judicata* or *collateral estoppel* effect vis-a-vis the present action. An answer in the affirmative would certainly be dispositive of various of the remaining issues raised by pre-trial order.

The traditional doctrine of *res judicata* as applied in the judicial system is unyielding in making a judgment binding. The interest of parties and the public in ending litigation normally bars a party who has had his day in court from further pressing the same claim or the same defenses.

The doctrine of *collateral estoppel* is different from *res judicata* in that instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of an issue by the same parties even in connection with a different claim or cause of action.

Before *res judicata* can be invoked, a valid judgment—involving the same parties or their privies—must have adjudicated some matter with finality. See generally, *McDonald v. Mabee*, 243 U.S. 90 (1917); C. & C. *Merriam Co. v. Saalfield*, 241 U.S. 22 (1916); *Hartford Accident & Indemnity Co. v. Jasper*, 144 F.2d 266 (9th Cir. 1944). The application of *collateral estoppel*, on the other hand, is broader in most respects. The issue to be concluded must be the same as that involved in the prior action and must have been actually raised and litigated. *Cromwell v. County of Sac.*, 94 U.S. 351, 352-53 (1877). The purpose of *collateral estoppel* is to preclude the repeated controversy of matters judicially determined. To act as a bar, however, the issue in the present suit must be determinative of the matter in controversy. 1B *Moore's Federal Practice*, § 0.441(2) p. 3779 (1974).

The differences in these two doctrines is readily

apparent. The doctrine of *res judicata* necessitates an identity of causes of action while the invocation of *collateral estoppel* does not. In the present case, we are unable to conclude that the cause of action is substantially identical. The previous action was a proceeding brought before an administrative tribunal for the purpose of determining if Indian title land had been taken and if the Western Shoshone Identifiable Group was entitled to compensation for such taking. The present action is a proceeding in trespass brought by the United States against two individual members of the Western Shoshone National who assert defenses which present substantially identical issues. Defendants are collaterally estopped to relitigate these issues.

We reject the defendants' assertion that the requisite privity between the defendants and the Western Shoshone Identifiable Group is absent. The requirement of privity or identity of parties is justified by the well-established doctrine that a person cannot be bound by a judgment unless he has had reasonable notice of the claim against him and an opportunity to be heard in opposition to that claim. *Hansberry v. Lee*, 311 U.S. 32 (1940). Generally, a person whose interest was represented by one having authority to represent him is bound by the judgment, although he was not formally a party. *Kersh Lake District v. Johnson*, 309 U.S. 485, 491 (1940); *Ma Chuck Moon v. Dulles*, 237 F.2d 241 (9th Cir. 1956). It is unnecessary and unfair to permit relitigation of those same questions by a party or group whose interests were properly represented. Defendants' assertion that the Western Shoshone Identifiable Group was or should not have been authorized to represent defendants in the previous proceedings was disposed of in *Western Shoshone Legal Defense and Ed. Ass'n v. United States*, 531 F.2d 495, 499 (Ct. Cl. 1976).

> "The interlocutory order entered at that time ruled expressly that the Temoak Bands of Western Shoshone Indians, Nevada, has the right to maintain this action for and on behalf of the aboriginal Western Shoshone Identifiable Group, the land-using entity. Section 10 is therefore operative prima facie, and appellants must show 'fraud, collusion or laches' (or some comparable justification) in order to displace the Temoak Bands from their role of exclusive representation."

The Western Shoshone Legal Defense and Education Association, in which defendants claim membership, failed to demonstrate the requisite fraud or collusion. We find that the issue of whether the Western Shoshone Identifiable Group is authorized to represent the defendants is *res judicata*.

Defendants have also asserted that an identity of issues is lacking, thus precluding application of *collateral estoppel*. We disagree. As discussed earlier, the invocation of *collateral estoppel* requires that the issue to be concluded must be the same as that involved in the prior action. *Cromwell v. County of Sac.*, supra, at 352.53. The issue pending before this court is whether Indian title to the lands in controversy has been extinguished. The issues before the Indian Claims Commission were (1) whether the Western Banks of Shoshone Indians possessed or once possessed Indian title to the land in controversy; (2) whether such Indian title had been duly extinguished; and (3) whether the United States was obliged to pay compensation for such taking. We find that the issue concerning extinguishment of title to the land in controversy is substantially identical in both actions and the defendants are estopped from attempting its relitigation.

Collateral estoppel also requires that the issue to be considered must have been actually raised and litigated in the prior action. *Cromwell v. County of Sac.*, supra, at 352-53. The United States properly directs attention to the pleadings filed in *Shoshone Tribe of Indians of the Wind River Reservation v. United States*, 11 Ind. Cl. Comm. 387 (1962), specifically averment 25, where it was alleged:

> "In violation of the Western Bands' rights of ownership or occupancy in lands referred to in paragraph 15 hereof, or in violation of the right or title or ownership or occupancy recognized in the said lands by the Treaty of Ruby Valley, defendant has disposed of a large part of the said lands to settlers and others or has seized and converted a large part of said lands to its own use and benefit without compensation to said Western Banks or compensation agreed to by them . . ."

This averment was denied by the United States.

In discovering what issues were determined by the judgment in a prior action, this court is free to examine the pleadings and the evidence to determine if the judgment rendered was made as to each issue that was so

raised. 1B *Moore's Federal Practice*, §443(4) p. 3913 (1974). The fact that the "extinguishment issue" was actually raised and litigated is supported by the Court of Claims decision in *Western Shoshone Legal Defense & Ed. Ass'n v. United States*, supra, at 500.

> "[T]he Commission held that the Western Shoshones held aboriginal title to the territory involved here and that this title was extinguished by a process of gradual encroachment by whites and settlers.
>
> • • •
>
> "The Commission made its own determination that the Shoshone lands were held by separate Shoshone entities and that Indian title to the area in question was extinguished by encroachment."

We also believe that the applications of *res judicata* or *collateral estoppel* to the present case is not precluded by the fact that the previous suit is not final as set forth in Title 25 U.S.C. § 70(a) which provides:

> "When the report of the Commission determining claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment by the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission."

At the present time a final determination as to the amount of compensation to be awarded is still pending before Congress. The doctrine of *collateral estoppel* is still applicable, however, in certain situations where the requisite finality is missing but various issues or matters therein have received a final disposition. *Cleveland v. Second Nat'l Bank & Trust Co.*, 149 F.2d 466 (6th Cir. 1945); *Bee Mach. Co. v. Freeman*, 131 F.2d 190 (2d Cir. 1941); *Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co.*, 71 F. Supp. 111 (D.C. Cal. 1947). The only remaining issue pending in the previous litigation is the amount of compensation to be awarded. In the claims litigation the issues upon which we have relief seem to us to have been finally determined and adjudicated and are not subject to further modification or review. 25 U.S.C. 705.

The issue involving "taking" or "extinguishment" was determined by the Indian Claims Commission in *Shoshone Tribe of Indians of the Wind River Reservation v. United States*, 11 Ind. Cl. Comm. 387 (1962), and *Western*

Shoshone Identifiable Group v. United States, 29 Ind. Cl. Comm. 5 (1972). Similarly, the issue of whether the land in question was "public domain" land pursuant to the provisions of the Taylor Grazing Act was also decided adversely to defendants. Upon extinguishment in 1872, as determined by the Indian Claims Commission in *Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5 (1972), the land in controversy became subject to the general land laws and therefore part of the "public domain" at that particular time.

The Indian Claims Commission in its 1962 decision found that the Western Shoshone Indians once possessed Indian title to the land in question by aboriginal use and possession. *Shoshone Tribe of Indians of the Wind River Reservation v. United States*, 11 Ind. Cl. Comm. 387, 413-14 (1962). Since it was also the decision of the Commission in the above cited case, and in *Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5 (1972), that this Indian title had effectively been extinguished by July 1, 1872, the issue of whether Indian title existed in 1848 (date of the Treaty of Guadalupe-Hildalgo), is of no relevance to the present action.

The defendants have asserted that the Treaty of Ruby Valley "recognized" Indian title to the land in controversy of the Western Shoshone Indians, thus guaranteeing their continual right to use and occupy the land within the treaty boundaries. This issue was adequately raised and disposed of in *Western Shoshone Identifiable Group v. United States*, 35 Ind. Cl. Comm. 457, 472-74 (1975). The Commission, in reviewing the Treaty of Ruby Valley, noted that there were no provisions granting legal rights to the Western Shoshone in the treaty lands. The Commission's interpretation is in accord with the Supreme Court's decision in *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 348 (1945). Although *Northwestern Bands* concerned the Treaty of Box Elder, it referred collectively to other related treaties, one of which was the Treaty of Ruby Valley.

> "In the Western Shoshone treaty permission was given for mineral, prospecting and extracting and the boundaries are said to define 'the county claimed and occupied' ... Nowhere in any of the series of treaties [including the Treaty of Ruby Valley] is there a specific acknowledgment

> of the Indian title or right of occupancy. It seems to us a reasonable inference that had either the Indians or the United States understood that the treaties recognized the Indian title to these domains, such purpose would have been clearly and definitely expressed by instruction, by treaty text or by the reports of the treaty commissioners, to their superiors or in the transmission of the treaties to the Senate for ratification."

The defendants' final contention involves the federal fiduciary and trust responsibility of the United States. That there exists such a trust responsibility to Indians is, of course, well established. *United States v. Kagama*, 118 U.S. 375 (1886). As discussed throughout this order, the issue of extinguishment of the title to the land in controversy has already been determined adversely to the defendants. Any fiduciary or trust responsibility owed by the United States to the defendants regarding the Indian title land ceased upon its extinguishment in approximately 1872. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1954; *Edwardsen v. Morton*, 369 F.Supp. 1359, 1375 (D.D.C. 1973). The District Court in *Edwardson*, supra, stated at 1375:

> "Federal officers are obligated to protect aboriginal lands 'against intrusion by third parties' until such time as Congress acts to extinguish possessory rights therein."

Whether there existed a breach of fiduciary responsibility before or at the time of extinguishment (1872) was an issue solely to be determined by the Indian Claims Commission. The Indian Claims Commission Act, which provides the only forum available for Indian title litigations, covers only claims accruing before August 13, 1946, which had to be filed by August 13, 1951. 25 U.S.C. § 70 K (1963). Under the Indian Claims Commission Act, if the Act is properly invoked, recovery can be had for a government breach of its fiduciary obligation to protect Indian title land from third party interference. See *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 501-02 (1967); *Oneida Tribe of Indians of Wisconsin v. United States*, 165 Ct. Cl. 487, 493 (1964).

The defendants claim that they have been denied every opportunity to present evidence upon their substantive claim that title to the lands which are the subject of the instant case was never extinguished. The decision in *Western Shoshone Legal Defense & Ed. Ass'n v. United*

States, 531 F.2d 495 (Ct. Cl.) *cert. denied* 96 S. Ct. ____, 45 Law Week 3280 (1976), is dispositive of this issue. The Court of Claims in this action determined that the Western Shoshone Legal Defense & Ed. Ass'n, with which defendants assert their affiliation, waited over 39 years before seeking to participate in the claim proceedings before the Indian Claims Commission.

We therefore conclude that except for the amount of damages as a result of defendants' trespass, there exists no issue of material fact to be determined by this court.

In consideration of the premises and for the reasons stated,

IT HEREBY IS ORDERED that the defendants' cross-motion for summary judgment be, and hereby is, denied.

Further, IT IS THE ORDER of this court that plaintiff's motion for summary judgment be, and hereby is, partially granted, the only issue remaining being the amount of damages.

Counsel are directed to confer on arrangements to set a hearing on plaintiff's prayer for damages to determine if damages are warranted and if so, in what amount.

DATED: January 4, 1976.

/s/ Bruce R. Thompson
UNITED STATES DISTRICT JUDGE

No. 77-18

Supreme Court, U. S.
FILED
OCT 11 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

GUY OSCEOLA, APPELLANT

v.

JEROME K. KUYKENDALL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

WADE H. MCCREE, JR.,
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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1)(a), (c) and (d) of the Rules of this Court, appellees move the Court to dismiss this appeal for want of jurisdiction, to vacate the judgment below and remand for dismissal on mootness grounds, or to affirm the order of the three-judge district court.

OPINION BELOW

The opinion of the district court (J.S. App. A-8 to A-19) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on March 11, 1977. A notice of appeal was filed on May 4, 1977, and the jurisdictional statement was filed on July 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over appellant's direct appeal from an order of a three-judge district court dismissing his claim, without consideration of its merits, on the ground that it was premature.

2. Whether appellant's claim for declaratory and injunctive relief against appellee members of the Indian Claims Commission is moot.

3. Whether the district court correctly concluded that appellant's claim was premature.

STATEMENT

Appellant, who claims to be a "mem[illegible]of the Seminole Nation,"[1] brought this action on behalf of himself and a class of Seminoles who allegedly "have never been militarily defeated, have never signed a written treaty of peace, and have never ceded nor given over their right to freely live upon and utilize their aboriginal territory in what is now known as Florida."[2] Named as defendants were the five individual Commissioners of the Indian Claims Commission. In his complaint, appellant sought to enjoin entry of judgment in a consolidated case pending before the Commission on the grounds that the Act of August 13, 1946, 60 Stat. 1049, as amended, 25 U.S.C. 70 *et seq.*, creating the Commission is unconstitutional on its face and as applied to him and his class.

The consolidated case before the Commission was initiated by the Seminole Indians of Florida on August 14, 1950. That action (Docket No. 73) was later consolidated

[1]Complaint, p. 2. Appellant claims to represent a distinct group of Seminoles known as the Everglades Miccosukee Tribe of Seminole Indians.

[2]*Ibid.*

with a second petition (Docket No. 151) filed by the Seminole Indians of Oklahoma on July 23, 1951. The petitioners in both cases filed as representatives of the Seminole Indian Nation as it existed in Florida prior to 1823[3] and sought additional compensation for "Seminole" lands ceded to the United States under the Treaties of September 18, 1823, 7 Stat. 224, and May 9, 1832, 7 Stat. 368.

On September 17, 1954, while the consolidated action was pending before the Commission, a group of Indians purporting to act for themselves and for the "General Council of the Miccosukee Seminole Nation of Florida" filed a special appearance with the Commission and a "motion to quash" the petitions filed by the Seminoles of Florida and Oklahoma. The movants alleged that the petitions presented claims to lands on which members of the Miccosukee Seminole Nation resided and that the General Council of their Tribe had not authorized anyone to bring such an action on its behalf. On motion of the petitioners, the Commission struck the special appearance and the motion to quash from the record on April 8, 1955. The Court of Claims dismissed an appeal from that action by the Commission for lack of a final order (*Billie* v. *Seminole Indians of the State of Florida*, 146 F. Supp. 459 (Ct. Cl.)), and this Court denied certiorari (355 U.S. 843).[4]

On September 18, 1961, the same group of Indians, purporting to represent the "Executive Council of the

[3]When the petitions were filed, the Seminoles of Florida were not organized or recognized by the Secretary of the Interior under Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. 476. In 1957, certain Seminoles organized themselves and were recognized by the Secretary of the Interior. This recognized Tribe was thereafter substituted as petitioners in Docket No. 73. 19 Ind. Cl. Comm. 440, 445.

[4]The appeal to the Court of Claims was not renewed when the Commission entered its final judgment in 1976.

Miccosukee Nation," filed with the Commission a motion to dismiss the petitions filed by the Seminoles of Florida and Oklahoma. That motion was denied by the Commission on the same day (13 Ind. Cl. Comm. 326, 343). No appeal from that ruling was taken.[5]

On May 8, 1964, the Commission issued an interlocutory order finding that until September 18, 1823, the Seminole Nation, as then constituted, had possessed "Indian title" to most of the present State of Florida; that the United States had acquired the Seminole lands in Florida, outside a defined reservation, under the Treaty of September 18, 1823, 7 Stat. 224; that the Seminole Nation had recognized title to the 1823 reservation until May 9, 1832; and that the Seminole Nation of Oklahoma and the Seminole Indians of Florida, together, comprised the Seminole Nation as it existed in Florida until 1823. 13 Ind. Cl. Comm. at 339-340, 367-368. This decision was affirmed on appeal. *United States* v. *Seminole Indians of the State of Florida and the Seminole Nation of Oklahoma,* 180 Ct. Cl. 375.

On January 29, 1968, the federally-recognized Miccosukee Tribe of Indians of Florida moved for leave to intervene in the proceedings before the Commission.[6] In its supporting memorandum the federally-recognized Tribe disavowed the earlier attempts by Miccosukee Indians in 1954 and 1961 to dismiss the petitions, characterizing the first as "ill-advised" and the second as unauthorized. The Commission denied leave to intervene, holding that the Miccosukee Tribe had a common and undivided interest in

[5]Appellant associates himself with the Miccosukee Indians who filed the 1954 motion to quash and the 1961 motion to dismiss.

[6]These Miccosukee Indians organized and were recognized as a tribe under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. 476, on January 11, 1962. Appellant disavows any connection with the federally-recognized Miccosukee Tribe.

Docket No. 73 and that its interest was adequately represented by petitioners in that case (19 Ind. Cl. Comm. 440, 441-442, 446). The Commission stated that the Miccosukee Tribe "shares a community of claims with the organized Seminole Indians of the State of Florida, both being components of 'The Seminole Nation as it existed in Florida at all material times' * * *" (*id.* at 445).[7] No appeal was taken from that decision.

On October 22, 1970, the Commission entered a final judgment for $12,262,780.63 (24 Ind. Cl. Comm. 1). Both sides appealed, and the action was remanded for more detailed findings concerning the value of the land involved. *Seminole Indians of the State of Florida and the Seminole Nation of Oklahoma* v. *United States*, 455 F. 2d 539 (Ct. Cl.). Subsequently, the parties filed a joint motion with the Commission on March 17, 1976, settling all claims of the Seminoles of Florida and Oklahoma for $16 million (38 Ind. Cl. Comm. 62). Judgment for the amount was entered on April 27, 1976 (38 Ind. Cl. Comm. 91). No appeal from the Commission's final judgment was taken.

Meanwhile, appellant filed the complaint in this case on March 26, 1976. He alleged that entry of judgment in the proceedings before the Commission would deprive him and members of his class of their property without due process of law and deny them equal protection in violation of the Fifth Amendment. He also alleged that the Indian Claims Commission Act was unconstitutional on its face because it delegated to the Secretary of the Interior, without appropriate standards, authority to determine who may proceed before the Commission, and that the Act was unconstitutional as applied to him and his class because it

[7]The Commission accepted the Miccosukees' contention that they were not enrolled with, a part of, or associated with the petitioners in Docket No. 73. 19 Ind. Cl. Comm. at 443.

deprived them of rights without notice or opportunity to be heard. Finally, he alleged that entry of judgment by the Commission would deprive him of property in violation of international law. This allegation was based on an assertion that the United States had entered into a binding oral treaty with his ancestors in 1842.

After briefing and argument, the three-judge district court on March 11, 1977, granted appellees' motion to dismiss for failure to state a claim on which relief could be granted (J.S. App. A-8 to A-19). In its memorandum opinion (*id.* at A-16, A-18), the court concluded that the asserted property right claimed by appellant amounted only to unrecognized "Indian title," which at most entitled him and his class to possess and occupy the land, the fee title being vested in the United States. Accordingly, the court could not see how entry of judgment on the actions before the Commission would either affect appellant's asserted right of possession and occupancy or confer any new property right on the United States. Noting that there had been no actual or threatened interference with appellant's occupancy and use of the land, the court held that appellant's complaint was "premature" and "sets forth no concrete or current controversy" (*id.* at A-16 to A-18).

ARGUMENT

The decision of the three-judge court, dismissing appellant's claim as premature, may be appealed only to the court of appeals and not directly to this Court. Moreover, we submit that the case is now moot. Assuming that the merits of the district court's decision were nonetheless to be reached, the judgment below should be affirmed summarily on the ground that the questions presented are too insubstantial to merit plenary consideration.

1. The district court declined to reach the merits of appellant's constitutional claims, holding that "[his] complaint is premature" (J.S. App. A-16). The court noted that appellant's asserted rights to possession "are not presently threatened, and they may never be" (*ibid.*), and that judicial resources should not be expended " 'on problems which are abstract or hypothetical or remote' " (*id.* at A-17, quoting Davis, *Administrative Law Text* § 21.01, p. 396 (3d ed., 1972)). The court pointed out that "[appellant's] right of possession and occupancy will not be affected by the [Commission's] judgment" (*id.* at A-16).

Because the district court did not address the issues requiring consideration by a three-judge court, direct appeal does not lie to this Court. *MTM, Inc.* v. *Baxley*, 420 U.S. 799; *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90. In *MTM*, this Court decided that it had no jurisdiction over a direct appeal from an order of a three-judge court dismissing a suit on *Younger* v. *Harris* (401 U.S. 37) grounds, stating (420 U.S. at 804):

> [W]e conclude that a direct appeal will lie to this Court under §1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.

The Court declined to consider not only the merits of the claim but also whether the dismissal was justified, saying the correctness of that decision was for the court of appeals to determine. *Id.* at 804.

Application of that principle to this case is consistent with the limited nature of this Court's appellate jurisdiction. Dismissal for lack of a "concrete or current controversy" (J.S. App. A-18), like the dismissal for lack

of "standing" in *Gonzalez* v. *Automatic Employees Credit Union, supra,* does not require a three-judge court. See *MTM, Inc.* v. *Baxley, supra,* 420 U.S. at 802. Here as in *Gonzalez,* a single district judge could have refused to convene a three-judge court, or the three-judge court could have dissolved itself and left dismissal of the complaint to a single judge. See 419 U.S. at 100; *Ex parte Poresky,* 290 U.S. 30. In those events there could have been no appeal to this Court under 28 U.S.C. 1253, and hence there can be none here. *Gonzalez, supra,* 419 U.S. at 101.

The Court therefore should either dismiss this appeal for want of jurisdiction or, as it did in *MTM, supra,* vacate the order of the district court and remand the case to that court for entry of a fresh order from which timely appeal to the court of appeals might be taken. See 420 U.S. at 804.

2. Moreover, we submit that the case is moot. Appellees can no longer provide appellant with the relief he seeks, and hence there is no controversy between the present parties.

Appellant in his complaint sought an injunction against the entry of judgment by the Indian Claims Commission in *Seminole Indians of the State of Florida and the Seminole Nation of Oklahoma* v. *United States* (Docket Nos. 73 and 151). However, the district court declined to issue a temporary restraining order, and the Commission entered its final judgment in that case on April 27, 1976 (38 Ind. Cl. Comm. 91). No appeal was taken, and the judgment was subsequently reported to Congress pursuant to 25 U.S.C. 70t. See 122 Cong. Rec. S 6152 and H 3691 (daily ed., April 29, 1976). Congress appropriated funds to satisfy the judgment (Act of June 1, 1976, Pub. L. 94-303, 90 Stat. 597, 629; S. Doc. No. 94-180, 94th Cong., 2d Sess. 3 (1976)), and the appropriated funds were deposited in the United States Treasury for distribution.

In these circumstances, appellee Commissioners no longer have jurisdiction or power to grant the relief appellant requests. Congress has acted pursuant to the Commission's final judgment, and the injunction sought by appellant "would ostensibly avoid an event which had already passed beyond recall" (*Brownlow* v. *Schwartz,* 261 U.S. 216, 217). See also *Richardson* v. *McChesney,* 218 U.S. 487, 492. Whatever other avenues of relief may be open to appellant, his action against appellees is moot.

Thus, assuming *arguendo* that the Court has jurisdiction to consider this appeal, it should vacate the judgment below and remand with a direction to dismiss the action for mootness. *United States* v. *Munsingwear,* 340 U.S. 36,39.

3. If the merits of the district court's decision were nonetheless to be reached, we submit that the court's judgment is correct and should be affirmed.

The district court concluded (J.S. App. A-16, A-18) that appellant has not suffered, and may never suffer, any injury from the decision of the Commission in the *Seminole* cases. Although the complaint is unclear, appellant suggests a claim to original or aboriginal title which, if valid, would merely accord a right to possession and use at the will of the United States. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 279.[8] Appellant and his purported class do not claim that their occupancy of lands has been impeded or interrupted or concretely threatened, but only that they "must live with the uncertainty" (J.S. 11) that their possession might someday be challenged.

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[8]An assertion was made that "recognized Indian title" may rest on an "oral" treaty with one of appellant's ancestors in 1842 (see J.S. App. A-12). Article II, Section 2, of the Constitution sets forth the manner in which the United States enters into treaties. Whether or not it encompasses oral agreements, there is no indication here of the requisite Senate approval. See *Sac and Fox Tribe of Indians of Oklahoma* v. *United States,* 315 F. 2d 896, 897 (Ct. Cl.), certiorari denied, 375 U.S. 921.

Appellant nonetheless contends (J.S. 7-10) that he will be unable to defend against any later disruption of his possession because of the *res judicata* or collateral estoppel effects of the Commission's judgment in the *Seminole* cases. Whether this is so need not be determined until such time, if ever, as appellant suffers an interference with his claimed possessory rights. The district court in the present case did not hold that appellant was bound by the judgment of the Commission, and appellant remains free to argue on an appropriate occasion that he was not. Should a court then disagree with appellant and determine on a proper record that he was in privity with, or adequately represented by, the petitioners in those cases, see, *e.g.*, *Hansberry* v. *Lee*, 311 U.S. 32,[9] appellant can seek review of that decision at the appropriate time.[10]

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[9]The decision below does not conflict with *United States* v. *Dann*, D. Nev., Civil No. 7-74-60 BRT, decided January 4, 1976 (J.S. App. A-20 to A-28). In *Dann* the district court concluded that a prior decision of the Court of Claims (*Western Shoshone Legal Defense and Education Association* v. *United States*, 531 F. 2d 495) had settled the question whether the defendants were in privity with certain claimants before the Commission. In the present case the district court has made no such determination, and the question remains open for litigation at a later time.

[10]We do not believe that the constitutionality of the Indian Claims Commission Act, an issue not addressed by the district court, is properly before this Court on the present appeal. If this Court should reject our arguments and conclude that the district court should have considered that issue on its merits, we submit that the case should then be remanded to the district court for that purpose.

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal for want of jurisdiction, or vacate the judgment below and remand with a direction to dismiss for mootness, or, in the alternative, should affirm the order of the district court.

Respectfully submitted.

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No. 77-18

In the Supreme Court of the United States

October Term, 1977

No. 77-18

Guy Osceola, appellant

v.

Jerome K. Kuykendall, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-18

GUY OSCEOLA, APPELLANT

v.

JEROME K. KUYKENDALL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OPPOSITION TO MOTION TO DISMISS
OR AFFIRM

Pursuant to Rule 16(4) of the Rules of this Court, Appellant opposes the Motion to Dismiss or Affirm, but joins with Appellees in requesting that the case be remanded for entry of a fresh order from which a timely appeal could be taken to the Court of Appeals for the District of Columbia.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction of this appeal pursuant to 28 U.S.C. 1253?

2. Is this case moot?

ARGUMENT

Appellees' argument that the court below did not reach the "constitutional merits of the claim" is a reasonable interpretation of the opinion below, and Appellant has no objection to Appellees' recommendation that this case be remanded for entry of a fresh order to permit timely appeal to the Court of Appeals.

This case is not moot, because there has been no payment of the challenged award.

1. Appellees argue that the district court declined to reach the merits of the constitutional claims and that, therefore, appeal may be taken only to the Court of Appeals.

(Motion to Dismiss or Affirm, p.7) MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974). In Appellant's view, the district court did reach the merits of the consitutional claim. The opinion below appears to be open to both interpretations.

The district court found that the judgment of the Commission pursuant to the challenged statute will not affect Appellant's right of possession and occupancy, thus finding the statute free of constitutional defect. The Court wrote:

> Similarly, plaintiff's right of possession and occupancy will not be affected by the judgment. (J.S. App. A-16)

This was a determination, as a matter of law, of the legal effect of a judgment under the statute, and it was, thus, a decision on the merits of the constitutional attack upon the

statute. The court found the Appellant's claim to be premature only because the court interpreted the statute as not affecting his present rights. The Appellant claimed, on the contrary, that the statute and the Commission's judgment will, upon payment, impair his rights.

Nevertheless, the reading of the opinion below urged by Appellees is not unreasonable. The focus of the district court's opinion is upon the nature of Appellant's right rather than upon the operation and constitutionality of the statute. Appellees argue with some reason that this Court's decisions in MTM, Inc. v. Baxley, 420 U.S. 799 (1975), and Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974), be interpreted broadly and applied to preclude direct appeal in cases such as this.

Appellant has no objection to the Appellees' recommendation that this case be remanded for entry of a fresh order to permit a timely appeal to

the Court of Appeals. (Motion to Dismiss or Affirm, p.8) Such a disposition would be fair and consistent with the considerations and policies enunciated in MTM and Gonzalez, supra, particularly in light of the repeal of the three-judge court statute under which this action was brought. Act of August 12, 1976, P.L. 94-381, 90 Stat. 1119, repealing 28 U.S.C. 2281 and 2282. This was the disposition made in MTM, Inc. v. Baxley, supra. Moreover, full consideration of these issues by the Court of Appeals may elucidate and clarify the issues or obviate the need for ultimate consideration by this Court.

2. This case is not moot. Appellees argue that this case is moot because final judgment has been entered by the Indian Claims Commission. Congress has appropriated funds to pay the judgment and the appropriated funds have been deposited in the United States Treasury for

distribution. (Motion to Dismiss or Affirm, p.8) However, the harm which Appellant seeks to avoid by an action for injunctive and declaratory relief is the res judicata effect of a judgment of the Indian Claims Commission. 25 U.S.C. 70u provides:

> The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

Thus, although the Commission has entered final judgment, this case is not moot because the res judicata bar which Appellant seeks to avoid is not effective until the award has been paid. The district court below in denying a temporary restraining order concluded as a matter of law that ..."no harm can come to plaintiff until the date of payment..." Osceola v. Kuykendall, et al. Findings of Fact and Conclusions of Law, filed April 7, 1976.

The payment, which brings the res judicata provision into effect, has not occurred. The definition of the term, "payment," has five elements: (1) the discharge of an obligation (2) by an actual or constructive delivery (3) of the money by the debtor to the creditor (4) for the purpose of extinguishing an obligation (5) with acceptance as such by the creditor. See, Sokoloff v. National City Bank of New York, 224 N.Y.S. 102 (1927). Acceptance occurs when control over the money shifts from the debtor to the creditor. Group v. State National Bank of St. Louis, 76 F.2d 726 (8th Cir., 1935).

Applying this definition to this case, payment of the award has not occurred. The appropriated money is currently under the control of the United States and has not passed to the petitioners in the Indian Claims Commission proceeding. Because payment has not occurred, the district court had the power to prevent

harm to Appellant's interest in the land which was the subject of the Indian Claims Commission proceeding.

In any event, the question of mootness is an issue which could best be resolved after full briefing and consideration by the Court of Appeals. The issue of mootness was not raised before the district court.

Conclusion

The Motion to Dismiss or Affirm should be denied. Appellant joins in Appellees' alternative request that this case be remanded for entry of a fresh order in order to permit a timely appeal to the Court of Appeals.

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